STATE OF MICHIGAN

COURT OF APPEALS

JACINTA GROOMS and GREG GROOMS,

Plaintiffs-Appellants,

v

INDEPENDENCE VILLAGE,

Defendant-Appellee,

and

SENIOR VILLAGE MANAGEMENT and MIDWEST MANAGEMENT,

Defendants.

UNPUBLISHED
December 17, 2013

No. 311243
Oakland Circuit Court
LC No. 2011-116335-NO

Before: WILDER, P.J., and FORT HOOD and SERVITTO, JJ.

PER CURIAM.

In this premises liability action, plaintiffs, Jacinta Grooms and Greg Grooms, appeal as of right an order granting summary disposition in favor of defendant, Independence Village, pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff[1] went to visit her sister's apartment located at the independent and assisted senior living facility owned by defendant. When she arrived at the apartment, the cleaning service was at the apartment finishing its biweekly cleaning. Plaintiff heard one of the maids call out, "[w]e're done," and leave the apartment. Approximately 5 to 10 minutes later, plaintiff stepped into the bathroom, turned on the light, and slipped and fell on the bathroom floor (which she asserts was wet), injuring her wrist and leg. She thus initiated the instant lawsuit against defendants based upon premises liability. Plaintiff's husband sought damages based upon loss of consortium.

[1] Because Greg Grooms' claims are derivative in nature, the singular "plaintiff" shall refer to Jacinta Grooms.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10) arguing that the wet condition of the floor was open and obvious and that no special aspects of the condition existed such that defendants owed no duty to protect plaintiff from the same. The trial court granted defendant's motion for summary disposition, finding that the condition of the bathroom floor was open and obvious.

On appeal, plaintiffs argue that the trial court erred in granting summary disposition in favor of defendant, based upon the open and obvious doctrine, because it could not have been discovered upon casual inspection. We disagree.

This court reviews de novo a trial court's decision on a motion for summary disposition. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). This Court reviews a "motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Review is limited to the evidence that had been presented to the trial court at the time the motion was decided. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009). Summary disposition under MCR 2.116(C)(10) is appropriately granted "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Greene v AP Products, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Debano-Griffin v Lake County*, 493 Mich 167, 175; 828 NW2d 634 (2013).

A negligence claim requires that a plaintiff prove the following four elements: "(1) a duty owed to the plaintiff by the defendant, (2) a breach of that duty, (3) causation, and (4) damages." *Bialick v Megan Mary, Inc*, 286 Mich App 359, 362; 780 NW2d 599 (2009). The duties owed by a landlord to the social guests of a tenant are duties owed to invitees. *Petraszewsky v Keeth (On Remand)*, 201 Mich App 535, 540; 506 NW2d 890 (1993). Generally, a premise's possessor owes a duty to an invitee "to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, landowners are not absolute insurers of the safety of their invitees. *Kennedy v Great Atl & Pac Tea Co*, 274 Mich App 710, 712–713; 737 NW2d 179 (2007). Thus, a premises owner's duty generally does not encompass warning about or removing open and obvious dangers. *Lugo*, 464 Mich at 516.

Whether a hazardous condition is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger and risk presented upon casual inspection. *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002). Because the test is objective, this Court looks not to whether a particular plaintiff should have known that the condition was dangerous, but to whether a reasonable person in that plaintiff's position would have foreseen the danger. *Kennedy*, 274 Mich App at 713. If genuine issues of material fact exist regarding the condition of the premises and whether the hazard was open and obvious, summary disposition is inappropriate. *Bialick*, 286 Mich App at 363.

Viewing the evidence in the light most favorable to plaintiffs, we conclude that the wet condition of the bathroom floor was open and obvious. Plaintiff testified that she had visited her sister between 30 and 50 times from 2005 to 2010. Further, she testified that she had been present at her sister's apartment at least five times while it was being cleaned. Although plaintiff stated that she had no knowledge that the maids were mopping the bathroom floor, she did admit that she knew they were cleaning the apartment when she arrived. She also admitted that her sister does not clean the apartment and she assumed that the maids cleaned the entire apartment, which included the bathroom. Plaintiff additionally testified that she had seen mops and buckets at her sister's apartment on previous occasions and would assume that the floors are getting mopped, although she did not see buckets or mops in the apartment on the date of her fall. One of the cleaning people at the apartment on the day in question further testified that the mops and buckets were present on that date, though she was unsure whether they were inside the apartment or outside the apartment door. This cleaning person further testified that the wet floor was "shinier" than a dry floor, and though it may be difficult for others to detect, it was easy for her to see.

Plaintiff testified that on the date of her fall, before she entered the bathroom, she heard one of the maids tell her, "We're done." Plaintiff testified that she took one step into the bathroom, turned the lights on, then took another step and "slid right across" the bathroom floor. She claimed that she did not see anything on the floor prior to her alleged fall; however, she testified that one of defendant's personnel stated, "Yeah, right there . . . there's a little water," after arriving at the scene. Plaintiff further testified that she realized the floor was wet after her fall because her hands and clothing were wet.

A reasonable person in plaintiff's position would have discovered the wet bathroom floor upon casual inspection. As stated above, the test is objective, and this Court looks not to whether plaintiff should have known that the condition was dangerous, but to whether a reasonable person in her position would have foreseen the danger. *Kennedy*, 274 Mich App at 713. In applying this test to the present situation, a reasonable person, who is aware of the fact that a cleaning service had just finished cleaning an apartment, who had observed mops and buckets at the apartment while the cleaning service was there on prior occasions, and who knows cleaning involved mopping should foresee the danger of a wet floor in the apartment. In addition, although no warning sign was placed in the bathroom, a reasonable person who has visited an apartment over 30 times should be able to discover, upon casual inspection, that the white linoleum floor was wet. Notwithstanding the fact that plaintiff allegedly did not see any wetness on the floor prior to her fall, her testimony indicates that she did not turn on the bathroom light until she was already entering the bathroom. Furthermore, plaintiff herself testified that one of defendant's personnel observed the water, when he or she stated, "Yeah, right there . . . there's a little water." Therefore, there were no genuine issues of material fact that the wet condition of the floor was open and obvious.

Alternatively, plaintiffs argue that assuming the condition of the floor was open and obvious, the trial court failed to address the issue of whether the special aspects of the wet floor were unreasonably dangerous and/or effectively unavoidable, and the trial court erred in granting the motion without doing so. We disagree.

An issue is not properly preserved for appellate review if it is not raised before, and addressed and decided by, the trial court. *Hines v Volkswagen of Am, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005). While arguments raised below but not addressed by the trial court are generally not preserved, this Court may consider such issues where the lower court record provides all the necessary facts. *Id.* at 443-444. Here, plaintiffs raised below the argument that the condition of the bathroom floor was unreasonably dangerous and effectively unavoidable. However, the trial court did not specifically address this argument on the record in reaching its decision. Although this Court does not usually address an issue that was not addressed by the trial court, the lower court record provides all the necessary facts for this Court to determine that there were no genuine issues of material fact that the bathroom floor was not unreasonably dangerous or effectively unavoidable. *Id.*

Plaintiffs assert that even if the wet floor is considered an open and obvious danger, there were special aspects present because the condition was not easily discoverable and was unreasonably dangerous. If a court finds that the condition is open and obvious, it must then consider whether there are any special aspects that create an unreasonable risk of harm despite the condition being open and obvious. *Lugo*, 464 Mich at 517. "[I]f special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Id.* Therefore, the inquiry in such cases is "whether the 'special aspect' of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability." *Id.* at 517-518. Only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious doctrine. *Id.* at 518-519. "However, the risk must be more than merely imaginable or premised on a plaintiff's own idiosyncrasies." *Robertson v Blue Water Oil Co*, 268 Mich App 588, 593; 708 NW2d 749 (2005), abrogated on other grounds by *Hoffner v Lanctoe*, 492 Mich 450; 821 NW2d 88 (2012).

Despite plaintiffs' contention that special aspects existed because the wetness was undetectable and dangerous, walking through an accumulation of water on a bathroom floor does not pose an especially high likelihood of severe harm. In *Lugo*, our Supreme Court stated that, "[u]nlike falling an extended distance, it cannot be expected that a typical person tripping on a pothole and falling to the ground would suffer severe injury." *Lugo*, 464 Mich at 520. Similarly this Court, in *Corey v Davenport College of Business*, 251 Mich App 1, 7; 649 NW2d 392 (2002), stated, "[f]alling several feet to the ground is not the same as falling an extended distance such as into a thirty-foot-deep pit." Thus, the "unreasonable danger" contemplated by our courts is of a much higher degree than that presented here. The risk presented by the wet bathroom floor was a person falling a short distance to the ground and not the risk of falling an extended distance. Therefore, none of the alleged conditions presented in the instant case give rise to a uniquely high likelihood of severe harm if the risk is not avoided. *Lugo*, 464 Mich at 518-519.

Next, plaintiffs assert that the bathroom floor was effectively unavoidable because defendant's agent knew of the condition, made the bathroom available to its residents and guests, and invitees, such as plaintiff, who needed to use the bathroom, could not do so safely. The "special aspects" exception to the open and obvious doctrine for hazards that are effectively unavoidable is a limited exception designed to avoid application of the open and obvious

doctrine. *Hoffner*, 492 Mich at 468. Our Supreme Court has described effectively unavoidable as follows:

> Unavoidability is characterized by an *inability to be avoided*, an *inescapable* result, or the *inevitability* of a given outcome. Our discussion of unavoidability in *Lugo* was tempered by the use of the word "effectively," thus providing that a hazard must be unavoidable or inescapable *in effect* or *for all practical purposes.* Accordingly, the standard for "effective unavoidability" is that a person, for all practical purposes, must be *required* or *compelled* to confront a dangerous hazard. As a parallel conclusion, situations in which a person has a *choice* whether to confront a hazard cannot truly be unavoidable, or even effectively so. [*Id.* (Emphases in original).]

Here, not only did the apartment have two bathrooms available for use, plaintiff testified that she went into the bathroom to get a brush for her sister's hair. Plaintiff could have waited for the floor to dry before walking into the bathroom to retrieve a brush. Because plaintiff had a choice to enter the bathroom and was not required or compelled to confront this condition, this hazard was not effectively unavoidable. Therefore, there was no genuine issue of material fact that the bathroom was not unreasonably dangerous or effectively unavoidable.

Accordingly, the trial court properly granted summary disposition in favor of defendant. Not only was the condition open and obvious, no special aspects existed that gave rise to a uniquely high likelihood of harm or severity of harm if the risk was not avoided.

Plaintiffs assert that various misstatements of fact were made by defense counsel at the hearing on the motion for summary disposition, and the trial court, with knowledge of these numerous misstatements of fact, abused its discretion by denying plaintiffs' motion for reconsideration. We disagree.

This Court reviews a trial court's decision on a motion for reconsideration for an abuse of discretion. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 629; 750 NW2d 228 (2008). An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes. *Corporan v Henton*, 282 Mich App 599, 605-06; 766 NW2d 903 (2009).

According to MCR 2.119(F)(3):

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

This rule allows the court considerable discretion in granting reconsideration to correct mistakes, and to preserve judicial economy. *In re Estate of Moukalled*, 269 Mich App 708, 714; 714 NW2d 400 (2006).

Plaintiffs claim that defense counsel incorrectly stated that the cleaning service turned on the heat lamp to help dry the floor. Despite this contention, absent from the record is any indication that the trial court relied on such an alleged misstatement. Plaintiffs next assert that defense counsel's statement that plaintiff knew the white linoleum floor had recently been mopped was not based on any testimony. Once again, absent from the transcripts is there any indication that the trial court relied on this alleged misstatement in making its ruling. Therefore, plaintiffs have not shown that the trial court made a palpable error or that a different disposition of defendant's motion for summary disposition would result from the correction of the error. MCR 2.119(F)(3). Accordingly, the trial court did not err in denying plaintiffs' motion for reconsideration.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto